

# Exhibit D

**STATE OF NEW YORK  
DEPARTMENT OF HEALTH**

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In the matter of	:	
<b>Mary T. Bassett, M.D., M.P.H.</b> , as Commissioner	:	
of the New York State Department of Health, to	:	
determine the action to be taken with respect to	:	
	:	<b>Report and</b>
<b>Dygert Road School,</b>	:	<b>Recommendation</b>
<b>Twin Mountain School, and</b>	:	
<b>Shady Lane School</b>	:	
Respondents,	:	
	:	
arising out of alleged violations of Article 21 of the Public	:	
Health Law and Title 10 (Health) of the Official	:	
Compilation of Codes, Rules and Regulations of the	:	
State of New York (NYCRR).	:	

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To: The Honorable Mary T. Bassett, M.D., M.P.H.  
Commissioner of Health, State of New York

Hearing before: Natalie Bordeaux  
Administrative Law Judge

Held at: Montgomery County Annex Building, Room 214  
20 Park Street  
Fonda, New York 12068

Hearing date: May 2, 2022

Parties: New York State Department of Health  
Corning Tower, Room 2412  
Empire State Plaza  
Albany, New York 12237-0029  
By: Vanessa Murphy, Esq.

Dygert Road School  
Twin Mountain School  
Shady Lane School  
By: Ezra Wengerd  
139 H. Jones Road  
Canajoharie, New York 13317

Dygart Road School, Twin Mountain School, and  
Shady Lane School

### **JURISDICTION**

By notices of hearing and statements of charges dated March 7, 2022, the New York State Department of Health (the Department) advised Dygart Road School, Twin Mountain School<sup>1</sup>, and Shady Lane School (the Respondents) that hearings would be held pursuant to Public Health Law (PHL) § 12-a on charges that they admitted students, and continued to allow such students to attend their schools for more than fourteen days without documentation that the students were immunized against the diseases delineated in PHL § 2164 or medically exempt from the immunization requirements. These hearings were consolidated at the request of the Respondents' representative.

The Department seeks to impose a monetary penalty on each Respondent pursuant to PHL § 12. This enforcement process requires a hearing to be held in accordance with procedures set forth at PHL § 12-a and 10 NYCRR Part 51. The Department has the burden of proof. 10 NYCRR § 51.11(d)(6).

### **HEARING RECORD**

Department witnesses: James Brewster, Public Health Field Services  
Representative, Bureau of Immunization  
Barbara Joyce, Regional Coordinator, Bureau of  
Immunization

Department exhibits: 1-12

Respondent exhibits: A

A digital recording of the hearing was made. (2:14:42 in duration.)

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<sup>1</sup> Twin Mountain School is incorrectly referenced in the Department's records as "Pleasant View School."  
(Recording @ 12:56.)

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Shady Lane School

### **SUMMARY OF FACTS**

1. The Respondents are schools as defined in PHL § 2164(1)(a) and 10 NYCRR § 66-1.1(a), operated by members of the Old Order Amish and Mennonite Community Churches who have no access to the internet or other technologies, other than limited telephone use. (Recording @ 1:29:58; Exhibit 12.)

#### **Dygert Road School**

2. By notice dated November 9, 2021, the Department advised Dygert Road School's principal of record by mail at his home address (Recording @ 32:40), that an audit of the school's immunization records would be conducted on November 23, 2021 at 11:00 am at the school to determine its compliance with PHL § 2164. The school was advised to have the following information prepared for the audit:

- A list of all students that includes the grade in which they are enrolled.
- A list of susceptible students who may require exclusion in the event of a disease outbreak (also specified in PHL Section 2164).
- The immunization records for all susceptible students.
- A copy of the school's policies and procedures regarding compliance with PHL Section 2164. [Exhibit 4.]

3. On November 23, 2021, Public Health Field Services Representative James Brewster arrived at Dygert Road School and audited students' immunization records. He was given twenty-six immunization cards that contained student names but were otherwise blank. Mr. Brewster did not request the school's policies and procedures regarding compliance with PHL § 2164 and did not request information pertaining to susceptible students, including those with medical exemptions. (Recording @ 34:35; Exhibit 7.)

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4. The Department mailed a notice dated December 13, 2021 to Dygert Road School's principal of record at his home address, advising him that the immunization records of twenty-six students were reviewed at the school and found to be out of compliance with school attendance immunization requirements. The Department ordered Dygert Road School to immediately exclude students identified by the Department in an "attached list" until or unless they had evidence of compliance with immunization requirements. The Respondent was also required to submit the following information to the Department via email: (1) a summary of students and their compliance with immunization requirements within seven calendar days; (2) a written corrective action plan for continued review of all student immunization records within fourteen calendar days; and (3) a current list of excluded students with a completed, signed and notarized affirmation within thirty calendar days. (Exhibit 9.)

**Shady Lane School**

5. By notice dated November 8, 2021, the Department advised the principal of Shady Lane School by mail at his home address, that an audit would be conducted on November 23, 2021 at 1:00 pm at the school to review the school's immunization records and determine compliance with PHL § 2164. Shady Lane School was advised to have the following information prepared for the audit:

- A list of all students that includes the grade in which they are enrolled.
- A list of susceptible students who may require exclusion in the event of a disease outbreak (also specified in PHL Section 2164).
- The immunization records for all of the susceptible students.
- A copy of the school's policies and procedures regarding compliance with PHL Section 2164. [Exhibit 5.]

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6. On November 23, 2021, Mr. Brewster arrived at Shady Lane School and attempted to audit the school's compliance with immunization requirements but was not provided with any documentation by the adult on the premises. (Recording @ 58:40.)

7. The Department mailed a notice dated December 13, 2021 to Shady Lane School's principal at his home address to inform him that the school was required to exclude all students from school until or unless they had evidence of compliance with immunization requirements. The Respondent was also required to submit the following information to the Department via email: (1) a summary of students and their compliance with immunization requirements within seven calendar days; (2) a written corrective action plan for continued review of all student immunization records within fourteen calendar days; and (3) a current list of excluded students with a completed, signed and notarized affirmation within thirty calendar days. (Exhibit 10.)

**Twin Mountain School ("Pleasant View School" per Department records)**

8. By notice dated November 8, 2021, the Department advised Beneal Fisher by mail at his home address, that an audit would be conducted on November 23, 2021 at 9:00 am at "Pleasant View" School to determine its compliance with PHL § 2164. The school was advised to have the following information prepared for the audit:

- A list of all students that includes the grade in which they are enrolled.
- A list of susceptible students who may require exclusion in the event of a disease outbreak (also specified in PHL Section 2164).
- The immunization records for all of the susceptible students.
- A copy of the school's policies and procedures regarding compliance with PHL Section 2164. [Exhibit 6.]

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9. The school's name was not correct, and Mr. Fisher was no longer affiliated with "Pleasant View," "Twin Mountain," or any other school. (Recording @ 14:45, 18:56.)

10. On November 23, 2021, Mr. Brewster arrived at Twin Mountain School and reviewed students' immunization documentation provided by a teacher. He found one student to be fully compliant with immunization requirements, and several other students in the process of receiving required immunizations. He did not request the school's policies and procedures regarding compliance with PHL § 2164 and did not request information pertaining to all susceptible students, including those with medical exemptions. (Recording @ 1:08:40.)

11. The Department mailed a December 13, 2021 letter to Beneal Fisher at his home address to advise him that twenty-four students at "Pleasant View" School identified in an "attached list" were out of compliance with school attendance immunization requirements. The notice required the school to submit the following information to the Department via email: (1) a summary of students and their compliance with immunization requirements within seven calendar days; (2) a written corrective action plan for continued review of all student immunization records within fourteen calendar days; and (3) a current list of excluded students with a completed, signed and notarized affirmation within thirty calendar days. (Exhibit 11.)

12. The Department did not send the December 13 correspondence to the current school principal or other responsible party before serving the March 7, 2022 notice of hearing and statement of charges. (Recording @ 1:30:51, 1:46:46.)

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### ISSUES

Did the Respondents violate school attendance immunization requirements?

If so, what penalties should be imposed?

### APPLICABLE LAW

Every person in parental relation to a child in the State of New York shall have administered to such child an adequate dose or doses of an immunizing agent against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B which meets the standards approved by the United States public health service for such biological products, and which is approved by the Department under such conditions as may be specified by the public health council. PHL § 2164(2)(a).

A principal or person in charge of a school shall not admit a child to school unless a person in parental relation to the child has furnished the school with one of the following: (a) a certificate of immunization documenting that the child has been fully immunized according to the requirements of 10 NYCRR § 66-1.1(f); (b) documentation that the child is in process of receiving immunizations; or (c) a signed, completed medical exemption form approved by the Department from a physician licensed to practice medicine in New York State certifying that immunization may be detrimental to the child's health, containing sufficient information to identify a medical contraindication to a specific immunization and specifying the length of time the immunization is medically contraindicated. The medical exemption must be reissued annually. PHL § 2164(7)(a); 10 NYCRR § 66-1.3. Effective June 13, 2019, there is no longer a religious exemption to the requirement that children be vaccinated against the measles and other



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diseases to attend either public, private or parochial school (for students in pre-kindergarten through 12<sup>th</sup> grade), or child day care settings.

A principal or person in charge of a school shall not permit a child to continue to attend such a school for more than fourteen days unless a person in parental relation to the child has furnished the school with one of the documents specified in 10 NYCRR § 66-1.3. The fourteen day attendance limit may be extended to not more than thirty days where the student is transferring from out of state or from another country and can show a good faith effort to get the necessary evidence or where the parent, guardian or any other person in parental relationship can demonstrate that a child has received the first age-appropriate dose in each immunization series and that they have age-appropriate scheduled appointments for follow-up doses to complete the immunization series in accordance with the Center for Disease Control (CDC)'s Advisory Committee on Immunization Practices Recommended Immunization Schedules for Persons Aged 0 through 18. School Vaccine Requirements FAQ [Frequently Asked Questions] issued August 2019, New York State Department of Health, available at: [https://www.health.ny.gov/prevention/immunization/schools/school\\_vaccines/docs/2019-08\\_vaccination\\_requirements\\_faq.pdf](https://www.health.ny.gov/prevention/immunization/schools/school_vaccines/docs/2019-08_vaccination_requirements_faq.pdf).

For the diseases listed in PHL § 2164, in the event of an outbreak of a vaccine-preventable disease in a school, the commissioner may order school officials to exclude from attendance all students who have either been medically exempted from immunization pursuant to 10 NYCRR § 66-1.3(c) or are in the process of receiving required immunizations (susceptible students). 10 NYCRR § 66-1.10(a). Schools must maintain a list of susceptible students who should be excluded from attendance in the

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event of an outbreak of vaccine preventable disease. The list must include all students who have been excused from immunization under 10 NYCRR § 66-1.3(c) and students who are in the process of completing immunization series or awaiting the results of serologic testing for any vaccine preventable disease specified under 10 NYCRR § 66-1.3(b). 10 NYCRR § 66-1.10(c).

### **DISCUSSION**

The Department's sole charge against each of the three named Respondents is:

Admitting and continuing to allow students to attend school more than fourteen days without immunization documentation. PHL § 2164(7)(a), 10 NYCRR § 66-1.3 and § 66-1.4.

The Respondents acknowledged that not all students attending the schools were vaccinated. They explained that the current school immunization requirements violate their deeply held religious beliefs. (Recording @ 1:52:45, 2:07:31.)

The Respondents contended that they are home schools operating on private property and therefore should not be subject to New York State immunization requirements. (Recording @ 1:55:10.) Their claim is not consistent with applicable law and Department policy. The Department has determined that group instruction organized by parents and provided by a tutor for a majority of the instructional program constitutes the operation of a nonpublic school and is not home instruction. As such, students attending these programs must abide by immunization requirements. *See* School Vaccine Requirements FAQ issued August 2019, New York State Department of Health.

The Respondents also argued that their schools should be exempt from student immunization requirements because they do not receive funding from the State of New York. (Recording @ 1:54:34.) Here too, the Department has determined that a school's

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receipt or non-receipt of State funding is irrelevant with respect to its stated concern for increasing immunization rates amongst children. School Vaccine Requirements FAQ issued June 18, 2019, New York State Department of Health, available at: <https://www.p12.nysed.gov/sss/documents/nonmedical%20vaccine%20exemption%20FAQ%200618%20final.pdf>.

In light of the Respondents' acknowledgements that they did not comply with immunization requirements, the stated charge (Charge 1) against each Respondent school should be sustained.

**Civil penalty determination.**

Any person who violates, disobeys or disregards any regulation for which a civil penalty is not otherwise expressly prescribed by law shall be liable for a civil penalty not to exceed two thousand dollars for every such violation. PHL § 12. The Department seeks the maximum civil penalty of \$2,000 for each student that it has determined did not comply with immunization requirements.

Specifically, the Department seeks a \$52,000 civil penalty against Dygert Road School, representing the \$2,000 maximum civil penalty for twenty-six students whose immunization cards Mr. Brewster was given during his November 23, 2021 visit.

(Recording @ 1:59:30.) The Department seeks a \$46,000 civil penalty against Twin Mountain School because Mr. Brewster determined that twenty-three students at that school were not properly immunized. Although his December 13, 2021 post-audit letter asserts that twenty-four students were deemed out of compliance with immunization requirements (Exhibit 11), Mr. Brewster subsequently revised his determination

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downward to exclude one child who was too young to attend school (Recording @ 1:59:45.)

The Department seeks the imposition of a \$20,000 civil penalty against Shady Lane School on the tenuous grounds that it was more probable than not that at least one student in attendance violated immunization requirements and would have attended the school for more than ten days, with each day of attendance constituting a separate violation. (Recording @ 2:00:29.) Since schools are permitted to allow a student who has not satisfied immunization requirements to attend school for fourteen days before even a potential violation occurs, the stated basis for the Department's computation is legally incorrect, in addition to being unsupported by the evidence.

The Department's recommendation is intended to serve as a deterrent to future violations. (Recording @ 2:02:00.) However, for the reasons set forth below, it is recommended that no penalty be imposed against the Respondents.

Changes in school immunization requirements took effect on June 13, 2019. The Department's guidance regarding these changes states that "[a] joint notification by the NYS Department of Health, State Education Department, and Office of Children and Family Services was distributed to schools and child day care settings beginning on June 15, 2019," to apprise these entities that they were not allowed to admit students who were not immunized for religious reasons. School Vaccine Requirements FAQ issued June 18, 2019, New York State Department of Health. This guidance, however, was only made available online and thus inaccessible to the Respondents. (Recording @ 26:30.)

This hearing record contains no information regarding if or when the Respondents and/or members of the Amish and Mennonite communities were advised that they were

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no longer able to avail themselves of religious exemptions from immunization requirements. (Recording @ 25:33, 1:27:26.) Mr. Brewster, the Department's witness, recalled that Eli Mast, the principal of Dygert Road School, called him after receiving the December 13 post-audit letter, and expressed confusion regarding students' inability to be exempt from immunization requirements on religious grounds. (Recording @ 55:01.) Mr. Brewster also recalled auditing Respondent Shady Lane School in or around June 2019, just around the time when school immunization requirements changed, but was unable to say whether that school was notified of the changes. (Recording @ 1:27:26.)

Barbara Joyce, Regional Coordinator for the Department's Bureau of Immunization, was also unable to confirm how or that the Respondents were made aware of the change. She explained that the Montgomery County Department of Health works closely with the Amish and Mennonite communities but she did not know if that local department of health notified the Respondents about applicable law changes. (Recording @ 1:45:55.) Ezra Wengerd, the Respondents' representative, explained that he read about the law change in a newspaper and "heard people talking about it," but he also could not confirm whether the Amish and Mennonite communities received notification from either the State or local county departments of health. (Recording @ 2:07:02.)

The Department's notifications regarding and conduct of the audit process and its ultimate determinations are inconsistent. The Department's November 8 and 9, 2021 audit notices advised individuals identified by the Montgomery County Department of Health as the principals of the three Respondent schools (Recording @ 32:40, 58:01), that audits would be conducted of certain records regarding students' immunization. The schools were specifically advised to provide lists of enrolled students, lists of susceptible

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students who may require exclusion in the event of a disease outbreak, immunization records for all susceptible students, and the schools' policies and procedures regarding compliance with PHL § 2164. (Exhibits 4-6.) Nevertheless, when the audits were conducted by Public Health Field Services Representative James Brewster on November 23, 2021, he only sought information regarding students' actual receipt of vaccinations and did not request the information specified in the pre-audit letters. (Recording @ 59:35, 1:32:27, 1:34:52.)

After the audits were conducted, the Department sent its December 13, 2021 letters informing the Respondents of the audit findings. The December 13 letters advised that the schools failed to provide lists of susceptible students required to be excluded from school in the event of a disease outbreak and did not have policies and procedures regarding compliance with school attendance immunization requirements. (Exhibits 9-11.) However, that information was not requested during the audits. (Exhibits 7, 8.)

The December 13 letters to Dygert Road School and Pleasant View (Twin Mountain) School also stated that “[b]ased on the information available as part of this audit, the attached list indicates which students are not in compliance with school attendance immunization requirements.” (Exhibits 9, 11.) Mr. Brewster, who prepared and sent these letters to the Respondent’s principals, stated that he had attached lists of students who did not meet immunization requirements to the letters. (Recording @ 1:29:22.) The letters offered and moved into evidence did not include lists of students nor did the Department produce any such lists. (Exhibits 9, 11; Recording @ 1:29:58.)

All three December 13, 2021 letters required the Respondents to email the Department their compliance information, corrective action plans, and current lists of

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excluded students. (Exhibits 9-11.) Mr. Brewster, who acknowledged his awareness that the Respondent schools were operated by members of the Amish and Mennonite communities and therefore do not utilize the internet, conceded that he did not know how the Respondents would be able to access email to comply with the Department's requirements. (Recording @ 1:29:58.)

The Department accurately points out that notice is not required before or after an audit. (Recording @ 1:49:49, 2:04:53.) However, when determining a penalty, it is appropriate to consider the adequacy of the notice provided and how such notice might reasonably impact actions taken in response. It is also reasonable to consider the deficiencies in the Department's communications with the Respondents and in its evidence offered at the hearing to support the requested penalties. Key information was omitted from the notices, from the Department's directives with respect to the ensuing enforcement actions, and this hearing record.

The Department failed to offer reasonable accommodation for the Respondents' distinct religious and cultural differences throughout the audit process. Based upon the information offered at this hearing, the Respondents were likely not apprised of legal changes to school immunization requirements. Reading the pre-audit letters would also not have aided their preparation for the November 23 audits. Nor were they able to address issues raised during the audits before this hearing due to being required to do so by email submissions.

While the Department's direct examination of Mr. Brewster suggested that the Respondents made no attempt to resolve the issues raised in the audits (Recording @ 56:00, 1:04:30, 1:26:30), that characterization is inappropriate as it presupposes that the



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Respondents were afforded a full and fair opportunity to address these matters before this hearing. Although the mailing affidavits for the hearing notices and statements of charges attest to having enclosed a proposed stipulation and order, no stipulation and order was included in the notices that the Department presented at this hearing. (Exhibits 1-3.) It is therefore unclear whether the Respondents were given a proper opportunity to settle those charges by stipulation.

Ben Fisher, who was identified as the principal of "Pleasant View School," phoned Mr. Brewster and left a voicemail message to inform him that he was no longer affiliated with the school. The voicemail offered and moved into evidence contained neither a date nor a time stamp (Exhibit 12), markers routinely included with voicemail messages, and Mr. Brewster was unable to provide a date (Recording @ 1:25:15.) There is no evidence that the Department made any attempt after receiving that notification to discuss the audit findings with the person responsible for the affairs of the school. (Recording @ 1:30:51, 1:46:46.) Instead, the Department simply issued a statement of charges and a hearing notice.

Largely as a result of the Department's communication failures, the Respondents had little opportunity to resolve this matter with the Department. These small schools are instead now confronted with an unreasonable and vaguely justified demand, which is little more than an estimate on the Department's part of the number of violations that may have occurred, for \$118,000 in civil penalties.

The information provided through the Department's evidence and witness testimony does not justify as reasonable the penalties the Department seeks to impose. Factors that should be considered include:



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- The charges have only been established because the Respondents were forthcoming and candid in their admission that they were dealing with a situation in which members of their community vehemently objected to the required immunizations.
- There is cause to question the reasonableness of the Department's communication with the Respondents, beginning with whether or when the Amish and Mennonite communities were informed that religious exemptions no longer applied to school immunization requirements and that school age children could not continue attending school without immunizations, proof of natural immunity (when applicable), or documented medical exemptions.
- Even when presented with information showing that certain students had begun obtaining immunizations (Exhibit 8), the Department did not consider those students as having vaccinations in progress and request information regarding those students' follow-up appointments for remaining doses. 10 NYCRR § 66-1.3(b); School Vaccine Requirements FAQ issued June 18, 2019. Instead, those students were simply deemed not compliant with requirements. (Exhibits 3, 8.)
- Despite explicit instructions regarding students deemed susceptible in the event of a disease outbreak in pre-audit letters and in applicable law (those medically exempted and those whose vaccinations are still in progress), the Department made no attempt to distinguish those students when formulating these charges or requested penalties.

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- The Respondents were deprived of a reasonable opportunity to understand what the November 23, 2021 audits would be assessing (all immunization records rather than information regarding susceptible students.)
- The Department's determination that only fully immunized students would be deemed compliant with immunization requirements is a clear departure from applicable law.
- The Respondents were not presented with a reasonable opportunity to show compliance with requirements since the Department required submission of information by email only.
- The evidence fails to support the Department's representation that a stipulation and order accompanied the hearing notices and statements of charges. Mailing affidavits at the hearing specifically attest to including stipulations in those notices, but the Department did not produce the stipulations.
- The Department's calculations purporting to justify its proposed fine were poorly supported by specific facts, relying instead largely on assumptions and estimates in order to arrive at a six-figure fine for three small schools, with total enrollment far below 100 students. Consequently, the Department has not provided an intelligible basis for its penalty demand.

The Department's stated concern for overburdening the public health system (Recording @ 2:02:50), which the Respondents do not utilize, cannot override its obligation to provide adequate notice and reasonable opportunity to comply. Those obligations extend to all citizens of the State of New York subject to enforcement

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proceedings. For these reasons, it is recommended that no penalty be imposed on the Respondents.

**RECOMMENDATION:**

1. Charge 1 should be sustained with respect to Dygert Road School.
2. No penalty should be imposed against Dygert Road School.
3. Charge 1 should be sustained with respect to Twin Mountain School.
4. No penalty should be imposed against Twin Mountain School.
5. Charge 1 should be sustained with respect to Shady Lane School.
6. No penalty should be imposed against Shady Lane School.

DATED: May 25, 2022  
Menands, New York



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Natalie J. Bordeaux  
Administrative Law Judge